

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEQENDOW JAMAR CONLEY,

Defendant-Appellant.

UNPUBLISHED

April 12, 2011

No. 296545

Saginaw Circuit Court

LC No. 09-032290-FH-3

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

A jury convicted Dequendow Jamar Conley of discharging a firearm at a building¹, assault with intent to do great bodily harm less than murder (AWIGBH)², two counts each of felon in possession of a firearm³ and carrying a concealed weapon (CCW)⁴, and four counts of possession of a firearm during the commission of a felony (felony-firearm).⁵ Conley was sentenced as a third habitual offender.⁶ Because of a clerical error, the felony-firearm charge associated with the AWIGBH conviction was vacated. On appeal, Conley only challenges the sentence imposed for the AWIGBH conviction, asserting the inadequacy of the trial court's reasons for an upward departure.⁷ We affirm.

¹ MCL 750.234b.

² MCL 750.84.

³ MCL 750.224f.

⁴ MCL 750.227.

⁵ MCL 750.227b.

⁶ MCL 769.11. Conley was sentenced to five to ten years' imprisonment for each felon in possession conviction, three to ten years' imprisonment for each CCW conviction, five to eight years' imprisonment for discharging a firearm at a dwelling, ten to twenty years' imprisonment for the AWIGBH conviction and two years' imprisonment for each felony-firearm conviction.

⁷ The trial court imposed a minimum term of 120 months, a 20 month increase from the sentencing guidelines range of 34 to 100 months.

“On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.”⁸

The evidence established that Conley discharged a firearm several times toward two separate residences. Although one person was inside the first home and several individuals were inside and outside of the second home, no injuries occurred. Because of a clerical error, the court vacated Conley’s conviction of felony-firearm related to the AWIGBH conviction. Had that conviction not been vacated, Conley would have received an additional two-year consecutive sentence.

While a court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so and states the reason for departure on the record,⁹ a departure cannot be based “on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.”¹⁰ The trial court elucidated as its reasons for the upward departure the clerical error vacating the felony-firearm conviction associated with the AWIGBH conviction and because Conley’s conduct was “repetitious,” “callous” and endangered several lives. The trial court specifically opined that the sentencing departure was proportionate to Conley’s criminal conduct.

We reject Conley’s assertion that the trial court abused its discretion by considering the vacated felony-firearm conviction. Because Conley was convicted of AWIGBH using a firearm, it was reasonable for the court to find that he would have been convicted of an additional felony-firearm. As this reason meets the necessary criteria of being objective and verifiable, would keenly and irresistibly grab the court’s attention and is of considerable worth, the trial court was justified in imposing an upward departure from the guidelines at sentencing based on this factor.¹¹

We agree with Conley’s assertion that the remaining reasons elucidated by the trial court in support of the departure cannot be sustained as they were already take into consideration

⁸ *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008) (citations omitted).

⁹ MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007).

¹⁰ MCL 769.34(3)(b).

¹¹ *Smith*, 482 Mich at 299, 303.

within the guidelines scoring¹² and the court failed to specifically indicate whether it found that these variables had been given inadequate weight.¹³

Because the sentencing court indicated several reasons for the upward departure and we have found only one reason was substantial and compelling, we must determine whether the court would have “departed to the same degree” based solely on the vacated felony-firearm conviction. Specifically:

[I]f the trial court articulates multiple reasons, and the Court of Appeals determines that some of these reasons are substantial and compelling and some are not, the panel must determine the trial court's intentions. That is, it must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone.¹⁴

At sentencing, the court explicitly stated it intended “that the sentence be sustained; even if the appellate court determines that any of the rationales given for departure do not survive review.” Based on this record, remand for resentencing is unnecessary.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray

¹² See, Prior Record Variable (PRV) 7, MCL 777.57(2)(b); Offense Variable (OV) 1, MCL 777.31(1)(a); OV 9, MCL 777.39(1)(c).

¹³ See MCL 769.34(3)(b).

¹⁴ *People v Babcock*, 469 Mich 247, 260; 666 NW2d 231 (2003).